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5 Attorney for Plaintiff,  
6 Counter-Claim Plaintiff,  
7 And Counter-Claim Defendant,  
8 STEVEN KIM

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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION

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18 SECOND MEASURE, INC., a Delaware  
19 corporation,

CASE NO.: 3:15-cv-03395-JCS

20 Plaintiff,

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28 **STEVEN KIM'S ANSWER TO  
COUNTERCLAIM**

v.

29 STEVEN KIM, an individual,

Judge: Hon. Joseph C. Spero

30 Defendant.

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38 AND RELATED COUNTERCLAIMS.

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1 Steven Kim (“Kim”) hereby answers the Counterclaim of Michael Babineau  
2 (“Babineau”) and Lillian Chou (“Chou”) as follows:

- 3 1. Kim admits the allegations of Paragraph 1.
- 4 2. Kim denies the allegations of Paragraph 2, except admits that Chou purports to  
5 reside in San Mateo, California.
- 6 3. Kim admits the allegations of Paragraph 3.
- 7 4. Kim denies the allegations of Paragraph 4.
- 8 5. Kim denies the allegations of Paragraph 5.
- 9 6. Kim denies the allegations of Paragraph 6.
- 10 7. Kim denies the allegations of Paragraph 7, except with respect to allegations  
11 regarding Mr. Jafri, for which Kim lacks sufficient information or belief and denies  
12 the allegations on that basis.
- 13 8. Kim denies the allegations of Paragraph 8, except admits that Kim and Babineau  
14 agreed to start a business together in about September 2013.
- 15 9. Kim lacks sufficient information or belief to respond to the allegations of Paragraph  
16 9, and on that basis denies them.
- 17 10. Kim denies the allegations of Paragraph 10.
- 18 11. Kim denies the allegations of Paragraph 11.
- 19 12. Kim denies the allegations of Paragraph 12.
- 20 13. Kim denies the allegations of Paragraph 13.
- 21 14. Kim denies the allegations of Paragraph 14.
- 22 15. Kim denies the allegations of Paragraph 15.
- 23 16. Kim denies the allegations of Paragraph 16.

1 17. Kim denies the allegations of Paragraph 17.

2 18. Kim admits the allegations of Paragraph 18.

3 19. Kim incorporates his response to the incorporated paragraphs into his response to

4 this paragraph.

5 20. Kim admits the allegations of Paragraph 20.

6 21. Kim admits that Paragraph 20 accurately states Babineau and Chou's contentions,

7 but denies the truth of those contentions.

8 22. Kim admits the allegations of Paragraph 22.

9 23. Kim admits the allegations of Paragraph 23.

10 24. Kim admits the allegations of Paragraph 24.

11 25. Kim denies the allegations of Paragraph 25.

12 26. Kim incorporates his response to the incorporated paragraphs into his response to

13 this paragraph.

14 27. Kim admits the allegations of Paragraph 27.

15 28. Kim admits the allegations of Paragraph 28.

16 29. Kim admits the allegations of Paragraph 29.

17 30. Kim denies the allegations of Paragraph 30.

18 31. Kim denies the allegations of Paragraph 31.

19 32. Kim denies the allegations of Paragraph 32.

20 33. Kim denies the allegations of Paragraph 33.

21 34. Kim denies the allegations of Paragraph 34.

22 35. Kim denies the allegations of Paragraph 35.

23 36. Kim denies the allegations of Paragraph 36.

37. Kim incorporates his response to the incorporated paragraphs into his response to this paragraph.

38. Kim admits the allegations of Paragraph 38.

39. Kim denies the allegations of Paragraph 39.

40. Kim denies the allegations of Paragraph 40.

41. Kim denies the allegations of Paragraph 41.

42. Kim denies the allegations of Paragraph 42.

43. Kim denies the allegations of Paragraph 43.

44. Kim denies the allegations of Paragraph 44.

45. Kim incorporates his response to the incorporated paragraphs into his response to this paragraph.

46. Kim admits the allegations of Paragraph 46.

47. Kim denies the allegations of Paragraph 47.

48. Kim denies the allegations of Paragraph 48.

49. Kienzle, A.; Kienzle, B.; Kienzle, C.; Kienzle, D.; Kienzle, E.; Kienzle, F.; Kienzle, G.; Kienzle, H.; Kienzle, I.; Kienzle, J.; Kienzle, K.; Kienzle, L.; Kienzle, M.; Kienzle, N.; Kienzle, O.; Kienzle, P.; Kienzle, R.; Kienzle, S.; Kienzle, T.; Kienzle, U.; Kienzle, V.; Kienzle, W.; Kienzle, X.; Kienzle, Y.; Kienzle, Z.

50. Kiselev, A. I.; Shchegoleva, N. N.; Slobodcikov, S. P. Russ. J. Appl. Chem. 1996, 69, 150.

54. Kim incorporates his response to the incorporated paragraphs into his response to this paragraph.

55. Kim admits the allegations of Paragraph 55.

56. Kim denies the allegations of Paragraph 56.

1 57. Kim denies the allegations of Paragraph 57.

2 58. Kim denies the allegations of Paragraph 58.

3 59. Kim denies the allegations of Paragraph 59.

4 60. Kim incorporates his response to the incorporated paragraphs into his response to

5 this paragraph.

6 61. Kim admits the allegations of Paragraph 61.

7 62. Kim denies the allegations of Paragraph 62.

8 63. Kim denies the allegations of Paragraph 63.

9 64. Kim denies that Babineau or Chou are entitled to any of the relief requested in the

10 11 prayer for relief.

12 13 **AFFIRMATIVE DEFENSES**

14 15 Defendant on the Counterclaims Steven Kim (“Defendant”) hereby sets forth the

16 following as affirmative defenses to the claims in the Counterclaims of Michael Babineau

17 and Lillian Chou (collectively, “Plaintiffs”). In identifying each defense below, Defendant

18 in no way concedes that it has the burden of proof with respect to any issue in this action

19 even with respect to matters identified below as affirmative defenses.

20 21 **FIRST AFFIRMATIVE DEFENSE**

**(FAILURE TO STATE A CAUSE OF ACTION)**

22 23 As a separate, distinct, and independent affirmative defense, Defendant states that

24 the Counterclaim fails to state a cause of action against Defendant.

25 26 **SECOND AFFIRMATIVE DEFENSE**

**(UNCLEAN HANDS)**

27 28 As a separate, distinct, and independent affirmative defense, Defendant states that

29 Plaintiffs are barred from any recovery by virtue of unclean hands.

## THIRD AFFIRMATIVE DEFENSE (WAIVER)

As a separate, distinct, and independent affirmative defense, Defendant states that Plaintiffs are barred from any recovery in this action under the doctrine of waiver.

# **FOURTH AFFIRMATIVE DEFENSE**

## **(ESTOPPEL)**

As a separate, distinct, and independent affirmative defense, Defendant states that Plaintiffs are barred from any recovery in this action under the doctrine of estoppel.

## **FIFTH AFFIRMATIVE DEFENSE (STATUTE OF LIMITATIONS)**

3 As a separate, distinct, and independent affirmative defense, Defendant states that  
4 Plaintiff is barred from recovery by the relevant statute of limitations, and specifically,  
5 without any limitation, sections 339, 339(1) and 340, 340(a) of the Code of Civil  
6 Procedure.

## **SIXTH AFFIRMATIVE DEFENSE (FAILURE TO MITIGATE)**

0 As a separate, distinct, and independent affirmative defense, Defendant states that  
1 Plaintiffs are barred from any recovery, or any recovery must be reduced in this action,  
2 because Plaintiffs failed to mitigate their alleged damages.

## **SEVENTH AFFIRMATIVE DEFENSE (NO DAMAGES)**

6 As a separate, distinct and independent affirmative defense, Kim states that each and  
7 every cause of action in the counterclaim is barred because Plaintiffs suffered no damages.

## **EIGHTH AFFIRMATIVE DEFENSE (PRIVILEGE)**

As a separate, distinct, and independent affirmative defense, Defendant states that Plaintiffs are barred from any recovery in this action because the alleged wrongful activities of Defendant were or are privileged.

## **NINTH AFFIRMATIVE DEFENSE (JUSTIFICATION)**

9 As a separate, distinct, and independent affirmative defense, Defendant states that  
10 Plaintiffs are barred from any recovery in this action because the alleged activities of  
11 Defendant were and are justified.

## **TENTH AFFIRMATIVE DEFENSE NATIONAL OR WRONGFUL CONDUCT OF**

15 As a separate, distinct, and independent affirmative defense, Defendant states that  
16 individuals and entities other than Defendant willfully, or by want of ordinary care, brought  
17 about the injuries complained of in the Complaint, if any. As such, the alleged damages  
18 claimed by Plaintiffs should be apportioned according to the amount of fault attributable to  
19 the conduct of such other individuals and entities.

## ELEVENTH AFFIRMATIVE DEFENSE

**(PLAINTIFFS' INTENTIONAL OR WRONGFUL CONDUCT)**

23 As a separate, distinct, and independent affirmative defense, Defendant states that  
24 Plaintiffs willfully, or by want of ordinary care, brought about the injuries complained of in  
25 the Complaint, if any. As such, the alleged damages claimed by Plaintiffs should be  
26 apportioned according to the amount of fault attributable to the conduct of Plaintiffs.

# **TWELFTH AFFIRMATIVE DEFENSE (CONSENT)**

As a separate, distinct, and independent affirmative defense, Defendant states that Plaintiffs are barred from any recovery against Defendants as Plaintiffs impliedly and or expressly consented to the conduct, acts, or omissions complained of in the Counterclaims.

# THIRTEENTH AFFIRMATIVE DEFENSE (RATIFICATION)

9 As a separate, distinct, and independent affirmative defense, Defendant states that  
10 Plaintiffs are barred from any recovery against Defendant because Plaintiff impliedly and  
11 or expressly ratified the conduct, acts, or omissions complained of in the Complaint.

# FOURTEENTH AFFIRMATIVE DEFENSE

## (ADEQUATE LEGAL REMEDY)

14 As a separate, distinct, and independent affirmative defense, Defendant states that  
15 Plaintiffs are barred from asserting any claims for equitable relief because an adequate legal  
16 remedy exists respecting all of Plaintiffs' claims.

## **FIFTEENTH AFFIRMATIVE DEFENSE (GOOD FAITH JUDGMENT)**

20 As a separate, distinct, and independent affirmative defense, Defendant states that as  
21 to each claim alleged in the Counterclaim, Defendant acted at all times with good and  
22 proper judgment by interested persons through reasonable and proper means, and  
23 consequently, the alleged actions of Defendant are justified and privileged. Defendant  
24 further states, without admitting that any violation took place, that any violation of  
25 California Labor Law or of a Wage Order of the Industrial Welfare Commission was an act  
26 or omission in good faith, and that Defendant had reasonable grounds for believing he did  
27 not violated the California Labor Code or any Wage Order of the Industrial Welfare  
28 Commission.

## SIXTEENTH AFFIRMATIVE DEFENSE

**(Set Off)**

Should Plaintiffs recover from Kim, then Kim is entitled to a set off of any amounts owed against sums owed by Plaintiffs to Kim. As detailed in Kim's allegations in his counterclaim, Kim is owed a significant equity interest in Second Measure and/or damages.

## SEVENTEENTH AFFIRMATIVE DEFENSE

### (FAIRNESS)

9 As a separate, distinct, and independent affirmative defense, Defendant states that  
10 Plaintiffs are not entitled to any recovery against Defendant because the alleged acts or  
11 transactions complained of were fair and just in every respect.

## EIGHTEENTH AFFIRMATIVE DEFENSE

## (ACTIONS WERE WITHIN RANGE OF REASONABLENESS)

15 As a separate, distinct, and independent affirmative defense, Defendant states that  
16 Plaintiffs are not entitled to any recovery against Defendant because the alleged acts  
17 complained of involved management decisions that were within the range of  
18 reasonableness and therefore not actionable.

## NINETEENTH AFFIRMATIVE DEFENSE

## (UNJUST ENRICHMENT)

22 As a separate, distinct, and independent affirmative defense, Defendant states that  
23 with respect to each claim alleged in the Counterclaim, the relief sought would inequitably  
24 result in unjust enrichment of the Plaintiffs.

# **TWENTIETH AFFIRMATIVE DEFENSE**

## **(LACK OF WILLFULLNESS)**

As a separate, distinct, and independent affirmative defense, Defendant states that with respect to each claim alleged in the Counterclaim, he has not willfully or intentionally failed to pay any wages due and owing to justify any penalties or fees.

**TWENTY-FIRST AFFIRMATIVE DEFENSE  
FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**

9 As a separate, distinct, and independent affirmative defense, Defendant states that  
10 with respect to each claim alleged in the Counterclaim, Plaintiffs failed to timely and  
11 completely exhaust any administrative remedies.

**TWENTY-SECOND AFFIRMATIVE DEFENSE  
(RESERVATION OF DEFENSES)**

15 As a separate, distinct, and independent affirmative defense, Defendant states that it  
16 expressly reserves the right to assert additional defenses at any time.

17 | WHEREFORE, Defendant prays for judgment as follows:

18 1. That Plaintiff take nothing by way of its Counterclaim;

19 2. For costs of suit herein;

20 3. For such other relief as the Court may deem just and proper.

1 Dated: December 31, 2015.

2  
3 THE LAW OFFICES OF THOMAS V. CHRISTOPHER

4  
5 By: \_\_\_\_\_ /s/

6 THOMAS CHRISTOPHER

7 Attorneys for Defendant,  
8 Counter-claim Plaintiff, and  
9 Counter-claim-Defendant Steven Kim

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